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Nos. 80-415 and 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and ANDREW L. LEWIS, JR., Secretary of Transportation,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND APPELLEES

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QUESTIONS PRESENTED[1]

1. Whether the reorganization court's order of October 15, 1980, continuing in effect a preliminary injunction enjoining implementation of the labor protection program of the Rock Island Act, is properly before this Court and ripe for review.

2. Whether the provisions of the Rock Island Act, which require the reorganization court to impose retroactively a new employee protection obligation of up to $75 million to be paid the former employees of a single bankrupt, cashless and non-operating railroad, constitute a taking of private property without just compensation, a deprivation of property without due process of law, a departure from the separation of powers doctrine and a violation of the constitutional mandate that bankruptcy laws be "uniform . . . throughout the United States."

3. Whether the mere possibility of a later Tucker Act claim against the United States bars the Rock Island estate from obtaining injunctive relief against unconstitutional conduct.

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[1]Parent Companies, Subsidiaries and Affiliates of the Rock Island appellees are listed in Appendix A, *infra*.

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Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND APPELLEES

This brief is submitted on behalf of appellees William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees for the income debenture holders and first mortgage bondholders respectively, and Henry Crown, *et al.*, substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island.

JURISDICTION

No. 80-415. The district court's order from which appeal No. 80-415 is taken was entered on June 9, 1980. Appellant RLEA[2] filed a notice of appeal from that order under 28 U.S.C. § 1252 on June 11, 1980. (J.A. 10a.) On June 20, 1980, RLEA joined in a motion by the United States and the Interstate Commerce Commission (the "Commission" or "I.C.C.") requesting the district court to vacate its June 9 order. (J.A. 10a, 169a.) By that timely motion to vacate, RLEA's earlier notice of appeal was nullified and dissolved. Fed. R. App. P. 4(a)(4);[3] Sup. Ct. R. 11.3; 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1], at 4-65 n.17 (2d ed. 1980). RLEA never filed a timely notice of appeal following the district court's denial of the June 20, 1980 motion to vacate. 28

[2]The abbreviations used in this brief conform to the abbreviations employed in the briefs of appellant RLEA and the federal appellees except where otherwise noted. The Government defendants (the United States, the Secretary of Transportation and the Interstate Commerce Commission) did not file an appeal in No. 80-1239 and are thus technically appellees although they support the appellant RLEA. To avoid confusion, both the Government defendants and the RLEA are referred to as appellants, and Mr. Gibbons (the Trustee of the Rock Island) and the creditors and shareholders are referred to as appellees. When necessary to distinguish the RLEA from the Government defendants, the latter will be referred to as the "Government."

References to the Joint Appendix are designated "J.A." References to the Appendix to the Jurisdictional Statement in No. 80-415 are designated "80-415 J.S.App." References to the opening briefs of RLEA and the Government are designated "RLEA Br." and "Govt. Br." respectively.

[3]Rule 4(a)(4) provides in part:

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . (iii) under Rule 59 to alter or amend the judgment . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above."

U.S.C. § 2101. Although the Government filed a timely notice of appeal to this Court from the June 20 ruling, it did not docket its appeal. Thus, jurisdiction of this Court does not lie in No. 80-415.

No. 80-1239. The judgment of the court of appeals in No. 80-1239, affirming Judge McGarr's October 15, 1980 order continuing in effect the June 9 injunction, was entered on December 16, 1980. (J.A. 210a.) RLEA filed its notice of appeal to this Court on December 19, 1980 (J.A. 16a), and the appeal was docketed on January 21, 1981. The jurisdiction of this Court in No. 80-1239 is based on 28 U.S.C. § 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions and statutes listed by the appellants (RLEA Br. 4 and App. A), the appellees also rely upon the uniformity provision in the Bankruptcy Clause of the United States Constitution, art. I, §8, cl. 4. That clause provides that "[t]he Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . ."

STATEMENT

Course of Proceedings Below

No. 80-415. On June 5, 1980, appellees initiated this action in the United States District Court for the Northern District of Illinois challenging the constitutionality of the labor protection provisions of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399, codified at 45 U.S.C. §§ 1001-1018 (the "original Rock Island Act"), enacted into law on May 30, 1980. (J.A. 21a-42a.) After a hearing on the appellees' motion for a preliminary injunction, District Judge (now Chief Judge) Frank J. McGarr granted the injunction, finding a

probability that the original Rock Island Act's labor protection provisions would violate the Fifth Amendment rights of the Rock Island estate, its creditors and its shareholders and, if implemented, would cause irreparable injury to the estate. (J.A. 151a-158a.) Appellants thereupon unsuccessfully moved in the district court to vacate the preliminary injunction (J.A. 161a-184a), and then in this Court for a stay, *RLEA v. Gibbons*, 448 U.S. 1301 (Stevens, Circuit Justice) (opinion denying stay application); 448 U.S. 909 (1980) (order of the Court denying stay application). RLEA filed a notice of appeal from Judge McGarr's order granting a preliminary injunction but not from his subsequent order of June 20, 1980 denying appellants' motion to vacate that injunction. (80-415 J.S.App. 23a.) See *supra* at 2-3. On April 27, 1981, this Court postponed further consideration of the question of jurisdiction over appeal No. 80-415 to the hearing of the case on the merits. *RLEA v. Gibbons*, 101 S.Ct. 2014 (1981).

No. 80-1239. On September 29, 1980, Congress enacted Section 701 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, Title VII, § 701, 94 Stat. 1959 (the "Staggers Act"), which reenacted and amended the labor protection provisions of the original Rock Island Act which had earlier been found to be unconstitutional.[4] Thereafter, appellants unsuccessfully moved in the district court to vacate the June 9 preliminary injunction (J.A. 185a-209a), then in the Seventh Circuit Court of Appeals to stay that injunction (J.A. 16a-17a), and finally in this Court for a stay, *RLEA v. Gibbons* (Stevens, Circuit Justice, Jan. 27, 1981) (unpublished order denying stay application); 101 S.Ct. 1344 (Feb. 23, 1981) (order of the Court denying stay application).

In accordance with the expedited review procedures of the Rock Island Act, an appeal from Judge McGarr's refusal to vacate his preliminary injunction was taken to the United States

[4]Unless otherwise indicated, reference to the "Rock Island Act" is to the original Rock Island Act as amended by the Staggers Act.

Court of Appeals for the Seventh Circuit. The court of appeals affirmed Judge McGarr's decision by a 3 to 3 vote. (J.A. 210a-211a.) RLEA appealed to this Court, which noted probable jurisdiction of appeal No. 80-1239 on April 27, 1981. *RLEA v. Gibbons*, 101 S.Ct. 2014 (1981).

Statement of Facts

The Erosion Of The Rock Island Estate In Reorganization

After a decade of losses totalling $103.4 million (J.A. 361a), the Rock Island entered reorganization under Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. § 205, on March 17, 1975. Judge McGarr presided over the proceedings from the outset. At his direction, the Trustee continued rail operations for the next four and one-half years despite staggering losses. (J.A. 151a-152a, 261a-263a, 392a.)[5] At year-end 1975, the end of the first year of reorganization, the Trustee reported to the Commission that the estate had total assets of $441,126,044. (J.A. 296a.) During the reorganization years from 1975 through 1980, the Rock Island estate suffered net losses totalling $210,627,230.

By the summer of 1979, Rock Island's cash reserves had dwindled to the point that the Trustee could no longer pay his operating expenses. *See* Appendix A to *Kansas City Terminal Railway—Operate—Chicago, Rock Island & Pacific Railroad* (*"Directed Service Order No. 1398"*), 360 I.C.C. 289, 316, 322

[5]The Trustee reported these accelerating losses to the Commission:

Year	Net Losses
1975	$31,165,906
1976	5,186,918
1977	20,093,107
1978	17,178,002
1979	93,860,096
1980	43,143,201

(J.A. 300a, 307a, 313a, 320a, 330a.)

(1979). Cash and short-term investments of the Rock Island declined from a level consistently above $16 million in the reorganization years of 1975 through 1978 to only $3 million on June 30, 1979. (J.A. 374a.) At the same time, the Trustee reported a rapidly growing net working capital deficit of $52.2 million on June 30, 1979. (J.A. 371a.)

Labor's Role In The Reorganization Proceedings

During the first five years of reorganization, during which the Rock Island estate suffered enormous erosion, its employees continued to be employed by the Rock Island at a cost to the estate of almost $1 billion in wages and benefits. (J.A. 25a, 111a.) As part of his efforts to achieve an income-based reorganization, the Trustee sought more efficient work rules agreements with the labor organizations representing Rock Island employees. He anticipated that the cost savings from these work rules changes would fund the substantial wage increases sought by the unions. Thus, in April, 1977, the Trustee informed the unions that he could not agree to large wage increases without concurrently eliminating antiquated work rules and featherbedding. (J.A. 278a-279a.) Thirteen of the unions, representing a limited number of Rock Island employees, reached agreements with the Trustee to take effect prospectively. (J.A. 279a-280a.)

Despite the Rock Island's bleak financial condition, the two unions representing the largest number of Rock Island employees, Brotherhood of Railway and Airline Clerks ("BRAC") and United Transportation Union ("UTU") (both represented in these proceedings by RLEA), refused to agree to work rules changes and insisted that their members be given significant wage increases, with retroactive application, which the Trustee said the estate could not afford. (J.A. 279a-281a.)

On August 28, 1979, BRAC, and the next day UTU, struck the Rock Island. (J.A. 277a.) In order to achieve an orderly shutdown of operations, the Trustee issued notices of discharge or suspen-

sion to his contract employees in accordance with their collective bargaining agreements.

On September 20, 1979, the President of the United States declared a state of emergency and mandated a return to work by the striking Rock Island employees by appointing an Emergency Board pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 160. Exec. Order No. 12,159, 44 Fed. Reg. 54687 (1979). The unions did not, however, order their members to comply with the Presidential order and return to work. (J.A. 215a-217a, 278a.)

The depleted cash reserves of the Rock Island were quickly exhausted by the strike. On September 26, 1979, acting pursuant to 49 U.S.C. § 11125,[6] the Commission directed the Kansas City Terminal Railway Company to operate and provide rail service over the lines of the Rock Island based upon "the specific finding that [the Rock Island's] cash position makes its continuing operation impossible." *Directed Service Order No. 1398, supra*, 360 I.C.C. at 290. By virtue of that order, the Kansas City Terminal

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[6]Section 11125 in pertinent part provides as follows:

"(a) When a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title cannot transport the traffic offered to it because—

"(1) its cash position makes its continuing operation impossible;

* * *

"the Commission may direct the handling, routing, and movement of the traffic available to that carrier and its distribution over the railroad lines of that carrier by another carrier to promote service in the interest of the public and of commerce.

* * *

"(b)(5) A directed carrier may apply to the Commission for payment of an amount equal to the amount by which (A) the total expenses of that carrier incurred . . . exceed (B) the direct revenues from handling, routing, and moving that traffic over the lines of the other carrier during that period."

Railway Company conducted rail operations over Rock Island lines until March, 1980, for which it was subsidized by the Federal government.

Despite the implementation of subsidized directed service by the Commission, the Rock Island workers represented by BRAC refused to return to work until the Commission agreed that their entire membership would be employed in directed service operations, regardless of need. (J.A. 289a, 293a-294a.) This had the effect of materially increasing the cost of directed service operations to the Government. As a result of the Commission's directed service orders, the employment of most Rock Island workers was extended for an additional six months. (J.A. 31a, 111a.)

The Rock Island's Withdrawal From Rail Carrier Operations

The Rock Island estate remained cashless and continued to erode during the period of directed service. *See St. Louis Southwestern Railway—Temporary Authority—Chicago, Rock Island & Pacific Railroad*, 360 I.C.C. 729, 735-36 (1980). On December 28, 1979, the Trustee filed his Plan of Reorganization, which called for a reorganization built around an operating core railroad. (J.A. 5a.) On January 21, 1980, Peat, Marwick, Mitchell & Co., the reorganization court's independent expert, filed its report, which concluded that the Rock Island was not reorganizable as an operating railroad even if pared to its most profitable core. (J.A. 333a, 343a, 221a.) At hearings conducted by Judge McGarr on January 23 and January 25, 1980, the creditors and shareholders, joined by counsel for the Federal Railway Administration, speaking also for the Commission, urged the court to reject the Trustee's plan and to order the liquidation of the Rock Island in the public interest. (J.A. 226a-236a.)

On January 25, 1980, Judge McGarr concluded that "a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part . . . is just not possible. . . . " (J.A. 240a.) He instructed the Trustee to abandon efforts to reorganize

the Rock Island as an ongoing railroad and to commence its liquidation. (J.A. 239a- 240a.) The Trustee was thereupon directed to sell all of the remaining assets of the estate and to prepare a plan for distribution of the proceeds of the sale to the estate's secured creditors and, if possible, its other creditors and shareholders.

Judge McGarr's liquidation order was affirmed by the United States Court of Appeals for the Seventh Circuit, which held that "the history of this case indicates that the reorganization court has duly considered the public interest and has determined that continued operation of the Rock Island no longer serves the public interest." *In re Chicago, Rock Island & Pacific Railroad*, No. 80-1353 (7th Cir. Feb. 11, 1980) (J.A. 377a, 387a-388a, 392a), *petition for cert. filed sub nom. RLEA v. Gibbons*, 49 U.S.L.W. 3883 (U.S. May 12, 1981) (No. 80-1899). Following the entry of Judge McGarr's January 25, 1980 order, the Trustee began, and has continued, liquidating the Rock Island Railroad.

On April 14, 1980, the Trustee petitioned Judge McGarr to confirm the Rock Island's total abandonment of all rail lines and operations.[7] On that date, Judge McGarr referred the petition to the Commission for its recommendation and announced that he would rule on the petition and issues relating to that petition, including labor protection, on June 2, 1980. (J.A. 241a-248a.) On May 23, 1980, the Commission concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity . . . [and that] fairness to its creditors and shareholders dictates that the carrier be liquidated." *Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150, 152 (1980).

Addressing the question of whether labor protection should be imposed as a condition to abandonment, the Commission express-

[7] In 1979 Congress transferred jurisdiction to confirm the total abandonment of the Rock Island from the Commission to the reorganization court. See *infra* at 29.

ly deferred to the reorganization court's jurisdiction to decide that issue. The Commission did, however, point to its own long-standing practice of not imposing any labor protection conditions in cases of total line abandonments (363 I.C.C. at 161):

> In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted. *See, Wellsville, Addison & Galeton R. Corp.—Abandonment*, 354 I.C.C. 744, 746 (1978).

Judge McGarr confirmed the total abandonment of all Rock Island lines and service on June 2, 1980, characterizing his ruling as a "technical recognition" of the existing state of affairs. (J.A. 264a.) Judge McGarr reaffirmed his earlier January, 1980 determination that the Rock Island was entitled to withdraw its assets from further devotion to rail service in the public interest. He found (J.A. 270a):

> Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated and . . . that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920).

Judge McGarr also rejected RLEA's request that labor protection conditions be imposed in connection with the Rock Island's abandonment:

> The Court [has] found that labor protective conditions or arrangements are not required of Rock Island's estate pursuant to Section 17 of the [Milwaukee Road Restructuring Act] by reason of Rock Island's systemwide termination of operations and total line abandonment which do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. . . . [C]onsistent with ICC

> precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate.

(J.A. 270a-27la, citations omitted.)[6]

The Original Rock Island Act

In response to the reorganization court's liquidation order, Congress enacted legislation which attempted to impose upon the Rock Island estate the cost of a new "protection" scheme for its former employees. The original Rock Island Act was signed by President Carter on May 30, 1980—four months after the entry of the liquidation order, 45 days after the confirmation of abandonment was requested, one week after the Commission reported to Judge McGarr that it concurred in his decision to liquidate the Rock Island, and three days before Judge McGarr's expected confirmation of abandonment. The labor protection scheme is contained in Sections 106 and 110 of the Act.

The original Rock Island Act imposed up to $75 million in new employee protection obligations on the Rock Island estate. It required that the labor protection program be funded either directly from the assets of the estate or by a federally guaranteed loan. The loan obligation would have "administrative expense" status. Thus, repayment of the loan would give the Government priority over the interests of unsecured creditors and shareholders and possibly over the interests of secured creditors, including the first mortgage bondholders.[7]

[6]RLEA subsequently appealed the district court's June 2 order to the United States Court of Appeals for the Seventh Circuit. The court of appeals twice denied RLEA's motion for a stay of the abandonment order. *In re Chicago, R.I. & P.R.R.*, No. 80-1788 (7th Cir. June 19 and Sept. 18, 1980) (orders denying stay applications). This appeal has been argued and now awaits decision by the Seventh Circuit.

[7]The reorganization court did not reach the question of the priority of the claims of the secured creditors in relation to the "administrative expense" claim accorded the federal loan under Section 110 of the Act and the labor protection claim created by the Act. Thus, this issue is not before the Court.

The original Rock Island Act required that the $75 million prior obligation be imposed on the estate on an extremely short timetable. Section 106(a) provided that the Trustee and rail labor unions were to reach a "voluntary" agreement implementing the Act's labor protection program within ten days from the statute's enactment. In the event that no agreement was reached, the Commission was required under Section 106(b) to "impose" a labor protection arrangement on the estate within thirty days thereafter. Section 106(c) directed the reorganization court to order the Trustee to implement the arrangement devised by the Commission "immediately" upon issuance of the Commission's order. Section 106(d)(1) of the Act provided that no court could stay any Commission or reorganization court order imposing an employee protection scheme under the Act. Section 106(d)(2) of the Act established a truncated appeal procedure which expressly precluded subsequent review by this Court.

On June 5, 1980, in order to prevent implementation of the proposed scheme pursuant to this foreshortened statutory timetable, the Rock Island's Trustee, creditors and shareholders filed a complaint for declaratory relief and moved for a preliminary and permanent injunction against the implementation of the statute's labor protection mechanism. (J.A. 21a-41a.) On June 9, 1980, one day before the statutory procedures of the Act would automatically commence, the reorganization court conducted a hearing on the motion for a preliminary injunction. The hearing consisted of extensive arguments by counsel and the submission of affidavits. At the conclusion of the hearing, Judge McGarr found an "exceedingly great" probability that the Act would work an unconstitutional taking of the property of the Rock Island and deprive the Rock Island estate of due process of law in violation of the Fifth Amendment to the United States Constitution, by its summary imposition of a new $75 million labor protection claim on the liquidating Rock Island estate. (J.A. 152a-156a.) He rejected arguments that the Commission should be allowed to

devise a labor protection arrangement pursuant to the Act because in his view the taking mandated by the Act would be unconstitutional regardless of its amount. (J.A. 155a.) Accordingly, he entered a preliminary injunction enjoining implementation of the original Rock Island Act's labor protection scheme to prevent irreparable injury to the Rock Island estate. RLEA filed a notice of appeal to this Court from that order on June 11, 1980, under 28 U.S.C. § 1252. (J.A. 10a.)

On June 20, 1980, after additional briefing and argument by all parties, Judge McGarr denied the motion of the United States and the Interstate Commerce Commission, joined by RLEA, to vacate his June 9 preliminary injunction. He reiterated his finding that the statute was unconstitutional for "more than one reason", including the fact "that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking." (J.A. 183a-184a.)

On June 28, 1980, Justice Stevens, as Circuit Justice for the Seventh Circuit, denied RLEA's application for a stay of the district court's order and, in a memorandum opinion, indicated his preliminary agreement with the district court's conclusion as to the unconstitutionality of the original Rock Island Act. *RLEA* v. *Gibbons*, *supra*, 448 U.S. at 1305. This Court subsequently sustained Justice Stevens' denial of the stay. 448 U.S. at 909.

Although RLEA had joined in the motion to vacate the district court's June 9 preliminary injunction, RLEA never filed a second notice of appeal following the district court's denial of that motion on June 20, 1980. The Government filed a timely notice of appeal to this Court from the June 20 ruling, but did not docket its appeal. See *supra* at 2-3.

The Staggers Rail Act Of 1980

On September 29, 1980, Congress re-enacted, without substantial alteration, as part of the Staggers Rail Act of 1980, the same scheme to impose a new $75 million labor protection obligation

on the Rock Island estate which had been contained in the original Rock Island Act. *Compare* Sections 106 and 110 as amended by Section 701 of the Staggers Act *with* Sections 106 and 110 of the original Rock Island Act. 45 U.S.C. §§ 1005, 1008. RLEA Br. App. A.

The Staggers Act corrected some of the procedural defects of the original Act[10] and aggravated others.[11] The basic labor protection scheme, however, remained unchanged, as did the requirement that the Rock Island estate fund the statute's employee protection scheme directly, or through a federal loan with "administrative expense" status. Staggers Act, Section 701, amending Sections 106(a)-(c), (e), (f), and 110 of the original Rock Island Act. The Staggers Act added Section 124(c) to the original Rock Island Act; Section 124(c) provides that "nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act."

On October 7, 1980, RLEA and the Government requested Judge McGarr to vacate his order declaring the Act to be unconstitutional. Comparing the original Rock Island Act and the Staggers Act amendments, Judge McGarr observed (J.A. 203a):

> This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction.

[10]The Staggers Rail Act eliminated Section 106(d)(1) of the original Act, which precluded any judicial stay of a Commission order imposing labor protection under the Act, and the last sentence of Section 106(d)(2) of the original Act, which purported to preclude review by this Court of an order imposing a labor protection arrangement under the Act.

[11]The period during which the Trustee and labor unions are permitted to "negotiate" an agreement was reduced from ten to five days. Failing a "voluntary" agreement, the time within which the Commission is required to "impose" a labor protection arrangement was reduced from 30 to 15 days.

On October 15, 1980, Judge McGarr issued a written order continuing in effect his June 9 injunction. Judge McGarr specifically found that even if a Tucker Act remedy later became available, the Staggers Act would continue to expose the Rock Island to irreparable injury through the disruption of the ongoing liquidation. (J.A. 207a; see also J.A. 202a-203a.)

The Staggers Act also added extraordinary provisions regarding judicial review. Staggers Act, Section 701(a)(1), adding Section 124 to the Rock Island Act. The Seventh Circuit, in compliance with those provisions, heard the case *en banc* and decided it within the required sixty days after the filing of the notice of appeal. On December 18, 1980, the Seventh Circuit affirmed Judge McGarr's decision by a vote of 3 to 3. *RLEA v. Gibbons*, Nos. 80-2487 and 80-2536 (7th Cir. 1980) (J.A. 210a). RLEA sought stays of Judge McGarr's October 15 order, which were denied by the court of appeals and by this Court. See *supra* at 4. RLEA filed an appeal with this Court, which noted probable jurisdiction of the appeal in No. 80-1239 on April 27, 1981.

SUMMARY OF ARGUMENT

I. Congress' attempted retroactive imposition of a new $75 million burden on the moribund Rock Island estate to benefit former employees whose services are unneeded by any potential acquiring carriers is unconstitutional on its face for several reasons: it effects a taking of the Rock Island's property without adequate compensation and without due process of law; it violates the separation of powers doctrine; it violates the requirement that bankruptcy laws be uniform; and it violates the estate's substantive due process rights. If, however, this Court finds that further factual development is necessary to decide the ultimate constitutionality of the scheme, this Court should still affirm Judge McGarr's preliminary injunction because he did not abuse his discretion in enjoining the implementation of the Rock Island Act's labor protection scheme. To require the estate to fund the

$75 million scheme pending a final adjudication of the constitutionality of the Act is likely to constitute a taking and violate other constitutional rights, all of which would cause irreparable injury to the Rock Island estate, its creditors and shareholders.

II. The Rock Island Act works a taking of the Rock Island's property for a public purpose, which requires that the estate receive just compensation for the property taken. A railroad has a constitutional right to withdraw its assets from public use when the operation can take place only at a loss. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396, 399 (1920). The reorganization court having determined that the Rock Island was unreorganizable as an operating railroad in whole or in part, having ordered total liquidation, and having formally confirmed the total abandonment of railroad operations, the Rock Island was constitutionally entitled to withdraw from rail service. It follows that Congress could not require it to incur further obligations, such as the Rock Island Act's labor protection scheme, in the public interest or as a condition of withdrawal from rail operations.

Appellants' argument that the Rock Island Act confers a benefit upon the Rock Island because it is a substitute for labor protection that would otherwise be imposed on the estate is without merit. The statutes they rely upon to show that the Rock Island had a pre-existing labor protection obligation incorporate the prior practice of the Interstate Commerce Commission in determining employee benefits. The unbroken line of Commission authority has been that labor protection is not to be imposed as a condition of total line abandonment. Thus, the Act cannot be viewed as compromising a pre-existing obligation.

If Congress determines that national transportation policy requires that those Rock Island former employees no longer needed to operate former Rock Island lines must be supported, the cost must be borne by the public. The Rock Island cannot constitutionally be required to fund this public purpose.

III. In addition to effecting a taking for which just compensation is required, the labor protection provisions of the Rock Island Act are constitutionally deficient in a number of additional important respects.

First, despite the long pendency of the reorganization proceedings and Congress' awareness that the reorganization court was about to rule on the propriety of imposing labor protection as a condition to total line abandonment, the Rock Island Act directs the reorganization court in a particular case to impose labor protection and to adopt a plan to be devised by the Commission. Consequently, the Rock Island Act is a rare and flagrant instance of legislative direction to a court as to the outcome of a single pending case, and is thus invalid under the constitutional doctrine of separation of powers.

Second, the Rock Island Act violates the uniformity provision of the Bankruptcy Clause of the United States Constitution, art. I, § 8, cl. 4. It is a "law on the subject of bankruptcies" because it affects the relations between a debtor and its creditors. It does not, however, apply to another railroad similarly situated. Another railroad is in liquidation, yet no comparable scheme has been proposed. Indeed, the only somewhat comparable plan was imposed on the Milwaukee Road, a railroad undergoing a successful reorganization, not abandonment and liquidation, and thus not subject to *Brooks-Scanlon, supra*, and its progeny. As a law applicable only to a single bankrupt, which cannot benefit from its provisions, the Rock Island Act cannot pass constitutional muster under the uniformity provision of the Bankruptcy Clause. For similar reasons, the Act also fails to satisfy the equal protection component of the Fifth Amendment Due Process Clause.

Finally, the Act's imposition of a labor protection scheme is retroactive. The Rock Island Act does not relate to costs incurred

during or because of an employment relationship and not previously discharged by the employer. Here, the Rock Island Act's obligation is imposed on the former employer to compensate former employees although they have already been fully compensated for their services. This retroactive aspect of the Rock Island Act renders it a taking of property without due process of law.

IV. The constitutional defects of the Rock Island Act are not cured merely because the estate is not precluded from suing the Government under the Tucker Act in an attempt to recover its money taken to fund the labor protection scheme. The Tucker Act does not provide the Government with a license to undertake actions which will result in violations of important constitutional rights, nor is it a substitute for normal legislative appropriations. Moreover, deferring resolution of these constitutional issues to a later proceeding before the Court of Claims would, in itself, cause irreparable injury to the bankrupt estate, its creditors and shareholders.

ARGUMENT

I.

ONLY JUDGE McGARR'S OCTOBER 15, 1980 ORDER CONTINUING IN EFFECT THE PRELIMINARY INJUNCTION ENJOINING IMPLEMENTATION OF THE ROCK ISLAND ACT'S LABOR PROTECTION SCHEME IS PROPERLY BEFORE THIS COURT FOR REVIEW.

In noting probable jurisdiction over No. 80-1239, this Court stated that it would postpone further consideration of the question of jurisdiction over No. 80-415 until the cases are heard on the merits. The Court directed the parties to address whether the issue of the constitutionality of the employee protection provi-

sions of the Rock Island Act is properly before this Court. Appellees contend that No. 80-415 is not properly before this Court, for the reasons stated *supra* at 2-3. In No. 80-1239, the issue of the facial constitutionality of the employee protection provisions of the Act is properly before this Court, as is the appropriateness of Judge McGarr's determination that the Act should be preliminarily enjoined.

A. This Court Has Jurisdiction To Review Judge McGarr's October 15, 1980 Order.

This Court has jurisdiction over appeal No. 80-1239. Section 1252 of the Judicial Code expressly grants this Court jurisdiction over appeals "from an interlocutory . . . decree or order of any court of the United States . . . holding an Act of Congress unconstitutional," where an officer of the United States is a party. 28 U.S.C. § 1252. In accordance with this statute, this Court has consistently entertained appeals from grants of preliminary injunctions where the lower court's action was predicated on a finding that a Congressional act was unconstitutional and where an officer of the United States was a party. *See, e.g., McLucas v. DeChamplain*, 421 U.S. 21 (1975). The appeal in No. 80-1239 falls squarely within this jurisdictional grant. Judge McGarr based his decision continuing the preliminary injunction in effect on a finding that the Rock Island Act is unconstitutional, and the Secretary of Transportation is a party to this proceeding. Thus, Judge McGarr's order continuing in effect the preliminary injunction and the Seventh Circuit's judgment of affirmance are properly reviewable by this Court in this appeal.

B. Judge McGarr's October 15, 1980 Order Is Ripe For Review.

The Government and RLEA take divergent positions as to which constitutional questions are ripe for this Court's review.

They distinguish as separate issues (i) whether the Rock Island Act constitutes a taking of the bankrupt estate's property (the "taking" issue), and (ii) whether by expressly stating that "[n]othing in [the Rock Island Act] shall limit the right of any person to commence an action in the Court of Claims" under the Tucker Act, the Rock Island Act affords adequate compensation for any taking that might occur (the "Tucker Act" issue).[12]

RLEA urges that the Tucker Act issue be decided now but that the taking issue be deferred to a later Tucker Act hearing in the Court of Claims, thus ensuring that payments are made to its members now, regardless of the ultimate disposition of the taking issue. Thus, RLEA's position in effect is that the constitutionality of the Act is irrelevant so long as its members are immediately paid the Act's benefits. RLEA Br. 21-29. The Government, by contrast, advocates that this Court reach the taking issue first, so that if the Act is found to constitute a taking, Congress will have the opportunity to repeal the legislation before any moneys are paid out for which the Government would later have to make reimbursement. Govt. Br. 17-20.

RLEA bases its position that the taking issue is not ripe for review on the ground that the extent of the taking cannot be known until (i) the Commission is allowed to prescribe the terms of the labor protection arrangement, and (ii) factual inquiries (*e.g.*, "the true costs of the program in relation to the entire estate's worth") are completed. RLEA Br. 25-28. The Government argues that the taking issue is ripe for review on the grounds that (i) determination of the taking issue does not require any further factual inquiry, and (ii) in any event, Judge McGarr's orders respecting the issuance and continuance of the preliminary injunction were "in effect permanent injunctions", which can therefore be reviewed with finality. Govt. Br. 15.

[12]Appellants do not address whether the due process, separation of powers, and uniform laws on bankruptcy issues are ripe for review.

The correct position is discerned by examining the procedural posture of this case. The function of a preliminary injunction is "to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 101 S.Ct. 1830, 1833 (1981). As this Court explained in *Camenisch*,

> Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing. . . .

Judge McGarr's orders entering and then continuing a preliminary injunction in effect cannot be treated as a permanent injunction, as the Government suggests. Judge McGarr expressly stated at the conclusion of the hearing on the preliminary injunction that he was issuing a "preliminary injunction" and that he would determine later "whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order. . . ." (J.A. 157a; see also J.A. 179a-180a, 205a-209a.)

At no point in the proceedings did appellants request that the trial on the merits be advanced and consolidated with the hearing on the application for a preliminary injunction or the subsequent hearings on the motions to vacate the preliminary injunction, a procedure expressly made available by Rule 65(a)(2), Fed. R. Civ. P. To seek at a later date to treat the preliminary injunction hearing as the trial on the merits, as the Government now urges, violates the rule that there should be clear and unambiguous advance notice to all the parties of the court's intention to consolidate the trial on the merits and the preliminary injunction hearing so that the parties can have a full opportunity to present

their cases on the merits. *University of Texas v. Camenisch, supra*, 101 S.Ct. at 1834.

For whatever reasons, RLEA and the Government chose not to request the consolidation of the preliminary injunction hearing and the trial on the merits. Instead, on the eve of the enactment of the Staggers Act, they moved to vacate the preliminary injunction, and they then chose to appeal an order continuing the preliminary injunction in effect. They could have pressed for a hearing on the merits, presented additional evidence and then waited to appeal the permanent injunction, if granted. They did not do so.[13] Thus, what is before the Court for review is Judge McGarr's order continuing in effect a preliminary, not a permanent, injunction. Consequently, the proper standard for this Court's review, to the extent that factual determinations remain, is whether Judge McGarr committed an abuse of his discretion in continuing in effect a preliminary injunction enjoining implementation of the Rock Island Act. *Bath Industries, Inc. v. Blot*, 427 F.2d 97, 111 (7th Cir. 1970); *Beneficial Finance Co. v. Wirtz*, 346 F.2d 340, 344 (7th Cir. 1965).

RLEA is misguided when it suggests that the detailed inquiry into the taking issue not made by Judge McGarr at the hearings on the preliminary injunction can now be made only in a later proceeding under the Tucker Act.[14] RLEA Br. 26. Given the limited time available to him because of the extremely compressed timetable mandated by the original Rock Island Act and the Staggers Act (see J.A. 204a), Judge McGarr did all he was

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[13]As of the filing of this brief, neither appellant has requested that the reorganization court hold a trial on the merits.

[14]RLEA couples the suggestion that Judge McGarr made an inadequate factual inquiry with the argument that the complete factual inquiry can be deferred to a later hearing before the Court of Claims under the Tucker Act. The latter argument is addressed *infra* at 60-66.

able to do: he heard the arguments of the parties, he considered the limited evidence offered to him by way of affidavit, and then based upon this and upon his five years' experience presiding over these proceedings, he decided the issue. To suggest that Judge McGarr is now barred from making a detailed factual inquiry as to the existence of a taking, should a trial on the merits be required, is to treat an expedited hearing on an application for a preliminary injunction as a full-dress trial on the merits.

To the extent that the taking, the Tucker Act, the due process, the separation of powers and the uniform laws on bankruptcy issues present purely legal questions as to the constitutionality of the Rock Island Act, those issues can be fully determined by this Court at this time and they should be decided now. *Regional Rail Reorganization Act Cases* ("*3R Act Cases*"), 419 U.S. 102, 149 n.36 (1974). To the extent that the constitutionality of the Act cannot be resolved on its face and the resolution of these issues is dependent upon the determination of factual questions, the issue for review at this time is whether the court below abused its discretion in issuing a preliminary injunction pending a final trial on the merits.

The Act is unconstitutional on its face in that it commits a taking without adequate compensation, and in that it violates appellees' due process rights, the separation of powers doctrine and the mandate that bankruptcy laws be uniform. In the alternative, appellees contend that Judge McGarr did not abuse his discretion in finding a likelihood that the Act works an unconstitutional taking without adequate compensation as it applied to the Rock Island estate, that it was unconstitutional for other reasons as well, and that the preliminary injunction should remain in effect until there has been a trial on the merits before Judge McGarr because of the irreparable injury that would otherwise accrue to the estate.

II.

BY REQUIRING THE ROCK ISLAND ESTATE TO EXPEND ITS PRIVATE FUNDS FOR A PUBLIC PURPOSE THE EMPLOYEE PROTECTION PROVISIONS OF THE ROCK ISLAND ACT CONSTITUTE A TAKING UNDER THE FIFTH AMENDMENT FOR WHICH COMPENSATION IS REQUIRED.

A. Having Sustained Losses Of Over $200,000,000 During Reorganization, The Rock Island Estate Is Not Required To Expend Further Funds In The Public Interest.

The Rock Island filed its petition for reorganization under Section 77 of the Bankruptcy Act of 1898 on March 17, 1975. At year-end 1975, the Trustee reported total assets of $441,126,044. During the reorganization years from 1975 through 1980, the Rock Island estate suffered net losses totalling $210,627,230. See *supra* at 5. These losses accelerated as the reorganization progressed. In a single year, 1979, during which the strike occurred, the Rock Island lost $93,860,096. See *supra* at 5 n. 5. Thereafter, the Rock Island was declared cashless by the Commission, all of its rail operations ceased, and the Commission appointed a directed rail carrier to provide service over its lines. See *supra* at 7-8.

Against this background, on January 25, 1980, Judge McGarr concluded that the Rock Island could not be reorganized on an income basis as an operating railroad and ordered its liquidation. On June 2, 1980, he formally confirmed the abandonment of all of its lines and the total cessation of all rail operations. See *supra* at 8-11.

Judge McGarr's rulings followed the "basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be

a fundament of the taking provision." *In re Central Railroad of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974) (footnotes omitted). While railroads in reorganization can continue to be subject to governmental regulation to serve national transportation policy for reasonable periods pending efforts to achieve an income-based reorganization, governmental regulation of private property, including property owned by railroads, is limited by the Fifth Amendment. *3R Act Cases*, *supra*, 419 U.S. at 122-24.

At some point, railroad industry investors are entitled to withdraw their assets, or what remains of them, totally from public use. This limitation on permissible governmental impositions on railroad investors was originally established in the case of *Brooks-Scanlon Co. v. Railroad Commission*, *supra*, 251 U.S. at 399-400, which the Government concedes retains its vitality. Govt. Br. 27. In *Brooks-Scanlon*, this Court, speaking through Justice Holmes, struck down a state railroad commission order requiring a railroad to maintain rail operations when service could continue only through additional losses, reasoning that:

> If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

251 U.S. at 399. *Accord*, *Railroad Commission v. Eastern Texas Railroad*, 264 U.S. 79, 85 (1924); *Bullock v. Railroad Commission*, 254 U.S. 513, 520-21 (1921).

All parties agree that there is a point at which the *Brooks-Scanlon* principle absolves a railroad from expending its funds or consuming its assets in the public interest. RLEA Br. 40-41, Govt. Br. 26-27. RLEA and the Government refuse, however, to recognize that that point was reached either on January 25, 1980, when the Rock Island was found unreorganizable as an operating

railroad and ordered to liquidate, or on June 2, 1980, when the reorganization court confirmed the total abandonment of the railroad's lines and services.[15]

Only in instances where there remains some hope of an income-based reorganization can a bankrupt railroad be compelled to endure further losses. In *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railroad*, 294 U.S. 648 (1935), for example, this Court upheld an injunction which deferred the right of secured creditors to foreclose on collateral, where the sale would have impaired the ability of the court to achieve a successful reorganization under Section 77 of the Bankruptcy Act. This deferral was justified while there remained the prospect of a successful reorganization in that case and because the rights of the creditors to reclaim their investments would be preserved and even enhanced thereby. 294 U.S. at 676-77. Similarly, earlier in the Rock Island's current reorganization proceedings, the Seventh Circuit Court of Appeals upheld a priority borrowing by the Trustee to enhance the prospect of an income-based reorganization of the Rock Island, even though that borrowing would for a time displace the interests of the estate's creditors. It permitted the borrowing on the theory that it might foster the ultimate possibility of a successful income-based reorganization, in which the creditors would receive satisfaction of their claims. *In re Chicago, Rock Island & Pacific Railroad*, 545 F.2d 1087, 1090-91 (7th Cir. 1976). *See also New Haven Inclusion Cases*, 399 U.S. 392, 466 (1970), *quoting with approval and aff'g in relevant part, In re New York, New Haven & Hartford*

[15]The court of appeals has fixed January 25, 1980 (the date of the liquidation order) as the date on which the continued operation of the Rock Island no longer served the public interest, *In re Chicago, R.I. & P.R.R.*, No. 80-1353, *supra* at J.A. 392a, and June 2, 1980 (the date of formal confirmation of abandonment) as the date on which the Rock Island no longer had any obligations to operate under the Interstate Commerce Act, *Gibbons v. United States*, Nos. 80-1786 and 80-1858, slip op. at 8 (7th Cir. Aug. 26, 1981).

Railroad, 304 F.Supp. 793, 801 (D. Conn. 1969); *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 611 F.2d 662, 669 (7th Cir. 1979); *In re Penn Central Transportation Co.*, 384 F.Supp. 895, 918-19 (Special Ct. 1974), *aff'd in relevant part sub nom. Regional Rail Reorganization Act Cases*, *supra*, 419 U.S. at 122-25; *In re Penn Central Transportation Co.*, 382 F.Supp. 856, 868 (E.D. Pa. 1974). These decisions all recognize the *Brooks-Scanlon* principle.

Here, after five years of efforts to achieve an income-based reorganization and the consequent massive erosion of the estate, the Commission, the Federal Railroad Administration, the reorganization court and the United States Court of Appeals for the Seventh Circuit have agreed that there is no possibility that the Rock Island can be reorganized on an income basis as an ongoing railroad. See *supra* at 8-9. The reorganization court has determined that in view of the impossibility of reorganization on an income basis, the Rock Island is entitled to withdraw from the universe of industries subject to public regulation. *Brooks-Scanlon* and its progeny establish that the limited period during which Rock Island investors can be assumed to have agreed to commit the estate's resources to the public's transportation needs is long past. As this Court recognized in *Brooks-Scanlon*, in the absence of any remaining common carrier obligations, a railroad cannot be required to expend funds or continue to incur losses to further national transportation policy. Investors cannot be compelled to expend "money to maintain a railroad for the benefit of others who do not care to pay for it." 251 U.S. at 399.

If, as the appellants argue and Congress apparently determined (see *infra* at 41), national transportation policy requires "protection" of the Rock Island's former employees, then to require the Rock Island to pay for that protection is to require, indirectly, the unreorganizable and moribund Rock Island to continue to advance national transportation policy at a cost to the Rock Island

of up to $75 million. The Rock Island is not now, nor will it ever again be, an operating railroad. In this circumstance, the national transportation policy cannot override the constitutional rights of the Rock Island investors. For the same reason Congress cannot direct the Rock Island to resume rail operations, it cannot impose other public carrier obligations, such as a new labor protection scheme, on this defunct railroad. As in the case of the New Haven Railroad, "[t]he public interest has had one huge bite of the apple; it is not entitled to another." *In re New York, New Haven & Hartford Railroad, supra*, 304 F.Supp. at 801.

Whatever the public purpose stated in the Rock Island Act, the settled constitutional principle set forth in *Brooks-Scanlon* mandates that the Rock Island estate can no longer be required to bear further losses in order to advance national transportation policy. Thus, Judge McGarr properly determined that the Act is facially unconstitutional. In the alternative, should this Court conclude that the constitutionality of the Act cannot be resolved on its face, Judge McGarr did not abuse his discretion in finding an "exceedingly great" likelihood (J.A. 156a) that the Rock Island Act violates the constitutional principles set forth in *Brooks-Scanlon* and its progeny.

B. The Rock Island Estate Had No Pre-Existing Labor Protection Obligations.

The Government and RLEA attempt to justify the labor protection scheme of the Rock Island Act on the ground that the estate benefits from the employee protection provisions of the Act. Govt. Br. 35, RLEA Br. 41. Appellants premise their argument on the theory that the Act merely recodifies or limits pre-existing labor protection obligations of the estate. The Government and RLEA are mistaken. The reorganization court properly decided that the Rock Island had no pre-existing labor protection obliga-

tions. As Judge McGarr stated when he formally confirmed the abandonment of Rock Island rail operations, the determination that the Rock Island had no pre-existing labor protection obligations was constitutionally compelled by the *Brooks-Scanlon* line of cases and is consistent with an unbroken line of I.C.C. determinations. (J.A. 270a-271a.)

This line of Commission authority has remained unchanged despite numerous changes and recodification of the governing statute. Under Section 1a(1) of the Interstate Commerce Act, now recodified as 49 U.S.C. § 10903 (Supp. III 1979), prior to enactment of the Milwaukee Road Restructuring Act, 45 U.S.C. §§ 901-922 ("Milwaukee Act"), railroads were required to obtain certificates from the Interstate Commerce Commission in order to withdraw rail lines from service based upon a public convenience and necessity standard. In addition, it was for the Commission to decide what labor protection, if any, should be imposed as a condition to abandonment.

In 1979, Congress enacted a different procedure for abandonments of railroads in reorganization under Section 77 of the Bankruptcy Act of 1898, as amended. Section 17(a) of the Milwaukee Act, 45 U.S.C. § 915(a), transferred the jurisdiction to authorize abandonments of rail lines from the Commission to the reorganization court. It also transferred to the reorganization court jurisdiction to consider labor protection issues which arose in connection with such abandonments. Although Congress transferred jurisdiction to decide such questions from the Commission to the reorganization court, it specifically directed the court to look to the law of labor protection that had evolved under the Commission's decisions as the precedent the reorganization court must apply. The legislative history of Section 17(a) of the Milwaukee Act establishes that this transfer of jurisdiction from the Commission to the court was intended to make "no change in existing law as it affects employee protection." H.R. CONF. REP.

No. 96-583, 96th Cong., 1st Sess. 27, *reprinted in* [1979] U.S. Code Cong. & Ad. News 1747, 1759.[16]

Prior to the enactment of Section 17(a), Commission approval of abandonments of railroad lines was governed by 49 U.S.C. § 10903. Like Section 17(a), Section 10903 adopted the law of labor protection that had evolved under Section 11347 of the Interstate Commerce Act. 49 U.S.C. § 11347. Under Section 10903, when a railroad requested a certificate of abandonment in connection with the abandonment of a portion of the railroad, employee protection conditions were imposed. *See Oregon Short Line Railroad—Abandonment—Goshen*, 360 I.C.C. 666, 667 (1980). Congress specifically recognized, however, when it reenacted Section 10903, that systemwide abandonments are subject to a different set of rules. The legislative history of Section 10903 makes the point plainly, referring to

> [e]mployee protection no less beneficial than that established under Section 5(2)(f) of the Interstate Commerce Act and Section 405 of the Rail Passenger Service Act *but without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company*. . . .

[16]Section 17(a) provides:

> "[I]n authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 [of the United States Code]."

45 U.S.C. § 915(a).

Section 11347 is the recodification of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), which applies only to labor protection to be accorded in consolidation, mergers and acquisitions. Section 11347 provides that the I.C.C. shall require a

> "carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by [consolidation, merger or acquisition] as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45."

49 U.S.C. § 11347.

S. CONF. REP. NO. 94-595, 94th Cong., 2d Sess. 218, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 148, 233 (emphasis supplied).

The Commission's practice with respect to this discrete area of total line abandonments has remained consistent; it has refused to impose labor protection conditions on entire line abandonments. As the Commission pointed out in its advisory report of May 23, 1980 to the reorganization court, "[i]n past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted." *Chicago, Rock Island & Pacific Railroad—Abandonment, supra*, 363 I.C.C. at 161. *Accord, Montpelier & Barre Railroad—Abandonment*, Dkt. No. AB-202F—(I.C.C. Feb. 6, 1980); *Northampton & Bath Railroad—Abandonment*, 354 I.C.C. 784, 785-86 (1978); *Wellsville, Addison & Galeton Railroad—Abandonment*, 354 I.C.C. 744, 746 (1978); *Tennessee Central Railway—Abandonment*, 333 I.C.C. 443, 453-54 (1968); *East Carolina Railway—Abandonment*, 324 I.C.C. 506 (1964); *Okmulgee Northern Railway—Abandonment*, 320 I.C.C. 637, 645-46 (1964); *Rutland Railway—Abandonment*, 317 I.C.C. 393, 408 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers v. United States*, 217 F.Supp. 98 (N.D. Ohio 1963). *See also, In re New York, Susquehanna & Western Railroad Company*, 504 F.Supp. 851, 854-56 (D. N.J. 1980).[17]

[17]The Commission has recognized only two narrowly drawn exceptions to this rule, both of which are based upon a financial benefit conferred upon a surviving corporate parent by the abandonment. Labor conditions have been imposed in total line abandonments where the corporate parent of the abandoning rail carrier intends to assume all or some portion of the subsidiary's rail operations while relieving itself of the subsidiary's deficit operation. Labor protection conditions also have been imposed where the corporate parent of the abandoning carrier obtained financial benefit from the disposition of the abandoned properties which was greatly in excess of the parent's net investment in the subsidiary and aggregate losses. The cases listed by the Government as examples of the imposition of labor protection in total line abandonment situations all involved such benefits to surviving corporate parents. See Govt. Br. 30, n.17. These exceptions do not apply here.

In *Northampton & Bath Railroad—Abandonment, supra*, 354 I.C.C. at 785-86, the Commission justified its refusal to impose labor protection conditions on a total abandonment:

> After the entire line of a railroad is abandoned, no operating carrier remains to enjoy the benefits of the abandonment or pay the costs of employee protection. The Commission has generally refused to impose employee protective conditions which would in effect, require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease.

The Rock Island situation is singularly parallel to that of the Tennessee Central Railway. Like the Rock Island, the Tennessee Central had suffered years of consecutive losses, had consumed its stockholders' equity to offset those operating losses and had no hope of survival as a going concern. Given this history, the Commission concluded that it was "neither equitable nor warranted on any ground to require further consumption of the railroad properties for the payment of employees after the railroad ceases operations." 333 I.C.C. at 454.[18]

[18]The Commission stated (333 I.C.C. at 453-54):

"The applicant is a bankrupt business entity unable to meet either its long-term or immediate financial obligations. Despite its straitened financial circumstances through the years, TC has provided regular employment for its work force and has paid its employees in full satisfaction of the terms of their collective bargaining agreements. On the other hand, it has for many years been unable to provide a return of any kind to its stockholders and has fallen substantially short of meeting its legal obligations to others upon whom it has drawn for supplies, materials and equipment needed to sustain its operation. . . . To the extent it has paid the payroll and other current operating expenses while neglecting other obligations due, the railroad and its employees have been sustained by the creditors. Over the past 5 profitless years, the aggregate deficit has come to nearly $5 million, the stockholder's equity has been consumed in maintaining operations, assets are being further eroded, and the TC has reached the point where it cannot hope, as a going

(Footnote continued on following page.)

The Commission's consistent refusal to impose labor protection in total line abandonments—in the context of a railroad entitled to liquidate—is consistent with the right of investors to withdraw their property from public transportation service under the circumstances described in the *Brooks-Scanlon* line of cases, *supra* at 25-27. As this Court held in *Brooks-Scanlon*, *supra*, 251 U.S. at 400, no regulatory agency can "give the Court or Commission power to do what the Constitution of the United States forbids...." *See also Bullock v. Railroad Commission*, *supra*, 254 U.S. at 520-21.

The Commission has not expressly adverted to this constitutional limitation on its jurisdiction in refusing to impose labor protection conditions in cases of total line abandonments.[19] How-

(Footnote continued from preceding page.)

concern, to pay off its creditors. In such a situation, we find it neither equitable nor warranted on any ground, to require continued operation for the purpose of providing jobs for the carrier's employees or to require further consumption of the railroad properties for the payment of employees after the railroad ceases operation. In reaching this conclusion we are mindful of the fact that certain unemployment compensation is otherwise available to employees. Unlike the circumstances in *Washington and Old Dominion R. Abandonment—Virginia*, 331 I.C.C. 587, or *East Carolina Ry.—Abandonment*, 324 I.C.C. 506, TC is not affiliated with a large, financially strong corporation benefiting from the abandonment and capable of sharing some of the costs incident to an abandonment. The facts of this case do not warrant the imposition of labor protective conditions, and they will not be imposed."

[19]The Government argues that the distinction the Commission has drawn between total and partial line abandonments "has been solely as an exercise of its administrative discretion." Govt. Br. 29. It is conceivable, of course, that a financially healthy railroad may decide to withdraw totally from all rail operations. In that circumstance, it may be that the Commission properly enjoys the discretion to condition approval of that abandonment upon the payment of labor protection based upon the profits which may be derived from the abandonment. But that is not the case here. Here, there is only a railroad which is constitutionally entitled to withdraw from rail service under the *Brooks-Scanlon* line of cases. In that circumstance, there is no discretion in the matter for the reasons stated *supra* at 24-28.

ever, its reasoning based upon the public interest and fairness to a railroad's owners directly parallels the reasoning of *Brooks-Scanlon* and the cases following it. For example, in *Wellsville, Addison & Galeton Railroad—Abandonment, supra*, 354 I.C.C. at 746, the Commission stated:

> Prior Commission precedent in this area is well established. Employee protective conditions have not been imposed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations. *Okmulgee Northern Ry. Co.—Abandonment*, 320 I.C.C. 637 (1964). *Tennessee Central Ry. Co.—Abandonment*, 333 I.C.C. 443, 454 (1968).

Thus, the Commission has recognized that there is no justification for imposing labor protection conditions on total line abandonments. Accordingly, as the reorganization court recognized in its ruling of June 9, 1980, the new employee benefits imposed by the Rock Island Act, long after employment and railroad operations had ceased, are not a substitute for pre-existing employee benefits, because none existed. Rather, as Judge McGarr found, the Rock Island Act employee protection obligations are wholly new obligations imposed retroactively on the bankrupt estate, to the inevitable detriment of the estate, its creditors and shareholders.

C. The Rock Island Act Effects A Taking Of The Estate's Private Property For A Public Purpose.

Any taking of private property for a public purpose requires the payment of just compensation under the Fifth Amendment. RLEA and the Government argue that the Rock Island Act's employee protection scheme was permissible regulation which furthered the national transportation policy and consequently that both the scheme and the means chosen by Congress to

carry it out (funding from the assets of a bankrupt estate) are unassailable under the Due Process and Governmental Takings clauses of the Fifth Amendment. RLEA Br. 35-42; Govt. Br. 22-38. Contrary to their assertions, the public purpose of the Act's employee protection scheme does not insulate the Act from constitutional scrutiny; rather, it brings the Act within the prohibition of those clauses.

This Court stated the central purpose of the Takings Clause in *Armstrong v. United States*, 364 U.S. 40, 49 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

This Court, speaking through Justice Brandeis, in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935), found that not even the extreme exigencies of the Depression would justify the use without compensation of the property rights of a creditor for the benefit of a debtor merely because financial assistance to the debtor was found to be in the public interest:

> [T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded the public interest may be borne by the public.

The implications of the Fifth Amendment rule in the context of governmental regulation were set forth in the classic case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), where the Court, through Justice Holmes, stated:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that

> it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
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> * * *
>
> [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. . . . In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. at 415-16 (citations omitted).

While disavowing any "set formula" to determine when regulation becomes a taking for which compensation is required under the Fifth Amendment, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 101 S.Ct. 2352, 2370 (1981); *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979), this Court has laid down guidelines to determine when regulation becomes a taking. Those criteria include "the economic impact of the regulation on the claimant", "the character of the governmental action", and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); *see Kaiser Aetna v. United States, supra*, 444 U.S. at 175. See Govt. Br. 20-22. Moreover, as this Court recently directed: "these 'ad hoc, factual inquiries'

must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Mining & Reclamation Co., supra*, 101 S.Ct. at 2370. If, however, there is a facial challenge to a statute, the test is "fairly straightforward": the statute "effects a taking if it 'denies an owner economically viable use of his [property].' " 101 S.Ct. at 2370, *citing Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

Measured against these criteria, Judge McGarr correctly concluded that the Rock Island Act's employee protection scheme will effect a taking:

1. The Economic Impact on Claimant. The economic impact of the regulation on the claimant is severe. If the statute's employee protection scheme is funded directly from the Rock Island's assets under Section 106, the estate's money will be paid directly to the former employees. If payments to former employees are funded through an enforced federal loan under Section 110, that loan must be accorded "administrative expense" status. Under either method of funding, the labor protection obligations will have priority over the interests of the estate's shareholders and unsecured creditors, and may have priority over the sums owed to secured creditors and trade creditors with cost of administration status.[20] As Judge McGarr expressly found, for an estate with limited assets of uncertain value and massive liabilities (J.A. 328a-329a), the priority cost of up to $75 million mandated by the Act represents a "significant percentage of the [estate's] total assets." (J.A. 207a.) Without question, the Act's em-

[20]RLEA, while not challenging the standing of the estate in these proceedings, questions the standing of the creditors and shareholders to raise issues of facial unconstitutionality. RLEA Br. 27 n.13. Surely the imposition of a $75 million obligation on the Rock Island estate that will displace the interests of the unsecured creditors and shareholders and may displace the interests of the secured creditors is sufficient to confer standing not only upon the estate but also upon the creditors and shareholders.

ployee protection scheme would dilute the value of the estate and reduce the amount available to discharge its existing debts by an amount of up to $75 million.

This is not, as the Government argues, Govt. Br. 21, an instance of the destruction of one "strand" of a " 'bundle' of property rights". In those cases cited by appellants for that proposition, the Court did not examine what other property a person may have had in order to determine whether the invasion of one particular piece of property constituted a taking. Rather, this Court has looked to the degree of the invasion of the particular property in dispute to determine whether substantial value remained in that particular property despite the intrusion of the regulation or the limitation of the purposes for which that property may be used. In those cases cited by appellants, where this Court has looked to the degree of the invasion to find that no taking has occurred, some property value has remained intact despite the intrusion of the regulation or the limitation of the purposes for which property may be used. *See, e.g., Andrus v. Allard, supra,* 444 U.S. at 65-66; *Penn Central v. City of New York, supra,* 438 U.S. at 104, 130-31. Here, it is not relevant what other property the estate may have. The money spent to fund the Rock Island Act's labor protection scheme will be completely lost to the estate once it is paid out. This is the only property which the Court may consider in weighing the degree of the invasion, and obviously once the money is gone, it is of no value to the estate. *See Kaiser Aetna, supra,* 444 U.S. at 179-80. In any event, as set forth *infra* at 39, 63, the statute will withdraw from the estate a significant portion of its total assets.

RLEA argues that the estate is "not in reality, seeking to prevent any monies from being taken initially from the estate, but rather, is objecting to the estate's being required to borrow funds to comply with the statute", and that the labor protection provisions will "not deplete the cash reserves of the estate." RLEA Br.

27, 29. This mischaracterizes the obvious impact of the statute. Although the Act gives the estate the option of borrowing money from the Government to pay the Act's labor protection benefits immediately, the money is not a gift. Indeed, because it enjoys "administrative expense" status, it must be repaid ahead of the claims of the unsecured creditors and shareholders. The Trustee's Statement of Assets and Liabilities for year-end 1980 shows that the estate's liabilities exceed the net book value of its assets by $25 million. (J.A. 328a-329a.) Thus, while the imposition of a $75 million loan may not deplete the present cash position of the estate, the bankrupt estate will still ultimately be required to repay the loan.

2. *The Character of the Governmental Action.* The Rock Island Act is also deficient when measured against the second criterion of *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 124, the character of the governmental action. A taking is more readily found when there is a direct governmental interference with property rights. *Id.* Where the property taken is money, it is unnecessary to look for a "physical invasion" of property as a prerequisite for finding a taking within the meaning of the Fifth Amendment, as the Government suggests. Govt. Br. 21. Although there is no land for the Government to invade, the forced taking of $75 million from the monetary assets of this bankrupt estate is a sufficient "invasion" to invoke the protections of the Fifth Amendment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

That the Act requires the estate to pay the money to the former employees rather than to the Government does not make the scheme any less a taking. *See, e.g., 3R Act Cases*, *supra*, 419 U.S. at 152, 155 (statutorily mandated conveyance of Penn Central properties to Conrail, a private corporation, held a taking).

3. *Interference with Investment-Backed Expectations.* Application of the third criterion of the *Penn Central* case, the extent to which the regulation has interfered with distinct investment-

backed expectations, 438 U.S. at 124, fortifies the conclusion that the Rock Island Act's labor protection provisions constitute a taking for which just compensation is required. Both the Government and RLEA argue that the Act is consistent with the appellees' investment-backed expectations because the Act merely modifies a pre-existing obligation. Govt. Br. 34-37, RLEA Br. 36-40. As explained *supra* at 24-34, under the *Brooks-Scanlon* precedent and an unbroken line of I.C.C. cases, appellees had every reason to expect that no labor protection would be imposed if circumstances required the Rock Island to withdraw totally from rail services because it was unreorganizable as an income-producing railroad. The appellees certainly did not expect that once the system-wide abandonment of the railroad was ordered, a tremendous new burden would be imposed as a condition of the withdrawal from rail services. The two principal cases upon which appellants rely (RLEA Br. 36-38, Govt. Br. 34-35), *United States v. Lowden*, 308 U.S. 225 (1939); *I.C.C. v. RLEA*, 315 U.S. 373 (1942), in no way suggest the contrary, because neither case requires payments to former employees by a railroad having a constitutional right to abandon all rail operations. Neither case purported to overrule or limit *Brooks-Scanlon* or its progeny. Rather, both cases address labor protection obligations of railroads with ongoing railroad operations. Moreover, no investor or creditor could have anticipated that if a new labor protection obligation could be imposed, it would enjoy "administrative expense" status, to the possible detriment of secured creditors and to the certain detriment of shareholders and unsecured creditors. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

The justification for imposing regulatory burdens upon a going concern, *viz.*, that the economic cost of regulation is the price a company must pay for the privilege of engaging in a business that operates in interstate commerce, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20 (1976), is inapplicable here. Once a com-

pany engaged in a regulated activity has permanently lost its ability to produce income, it has lost the ability to realize any benefit from the regulated activity that would balance the economic burden of the regulation. At that point, newly imposed regulation ceases to be a mere adjustment of benefits and burdens because all possible benefits have disappeared, and the burden of the regulation becomes a pure taking.

The Government argues that the employee protection provisions of the Act are justifiable regulation because they ultimately benefit the Rock Island by limiting a potential obligation of the estate and providing a means for funding it. Govt. Br. 35. As was demonstrated *supra* at 28-34, there is no potential labor protection obligation of the estate. Moreover, Congress, in the recitals in the preamble to the Act, did not profess to be benefiting the Rock Island in any manner.[21] On the contrary, the preamble recognizes that the Rock Island was in liquidation and had withdrawn from rail operations. Thus, the preamble emphasizes the importance to the public interest of maintaining rail service in the Midwest and the role of employee protection in maintaining that rail service—a public interest goal which the Rock Island estate can no longer constitutionally be compelled to serve.

[21]The preamble reads as follows:

"Sec. 102. (a) Congress hereby finds that—

"(1) uninterrupted continuation of services over Rock Island lines is dependent on adequate employee protection provisions covering Rock Island Railroad employees who are not hired by other railroads;

"(2) for those Rock Island Railroad employees not hired by other rail carriers, there is no other practicable means of obtaining funds to meet the necessary costs of such employee protection that are assumed by the Rock Island Railroad;

"(3) a cessation of necessary operations of the Rock Island Railroad would have serious repercussions on the economies of the States in which such railroad principally operates; and

"(4) premature cessation of services over lines which are the subject of pending purchase application would result in harm to the shipping public and could imperil continuation of commuter service."

The Government, citing the Conference Report on the Staggers Act, H.R. CONF. REP. NO. 96-1430, 96th Cong., 2d Sess. 138, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 4110, 4170, identifies several other respects in which the Rock Island allegedly benefited from the Act. Govt. Br. 35 and n.22. First, the Government argues that the Act assisted an orderly liquidation process by making funds available for the payment of labor protection obligations. But, as has been shown *supra* at 28-34, the Rock Island had no pre-existing labor obligations and therefore did not require any funding for this purpose. Moreover, the funding to which the Government refers is a loan with "administrative expense" status. The imposition of a new loan which must be repaid in advance of other unsecured creditors and shareholders hardly advances the liquidation process or benefits the Rock Island.

The Government also refers to the fact that the Act expedited "agency consideration." Govt. Br. 35. Neither the Government nor the Conference Report on which it relies explains precisely in what respect the Rock Island was benefited by expedited "agency consideration" of its matters, especially since, by the time the Staggers Act was enacted, the Rock Island's total abandonment of rail operations had been formally confirmed.

The Conference Report to the Staggers Act cited by the Government (Govt. Br. 35 n.22) also states that the Rock Island estate "has benefitted from the Rock Island Transition Act . . . through the Congressionally-supported March 4, 1980, agreement. . . ." H.R. CONF. REP. NO. 96-1430, 96th Cong., 2d Sess. 138 (1980). Under an agreement between labor unions and operating carriers entered into on March 4, 1980, the employees who were needed to operate those parts of the Rock Island lines that would continue in rail service to be conducted by other carriers were already being given preference for hiring and other protections. Labor Protective Agreement Between Railroads Parties Hereto Involved in Midwest Rail Restructuring and Employees

of Such Railroads Represented by the Rail Labor Organizations Operating Through the Railway Labor Executives' Association ("March 4 agreement"), *reprinted in St. Louis Southwestern Railway—Temporary Authority—Chicago, Rock Island & Pacific Railroad, supra*, 360 I.C.C. at 744-51. The record before the reorganization court on the preliminary injunction hearing, and therefore the record before this Court in these appeals, is completely devoid of any evidence of a relationship between the Staggers Act and the March 4 agreement signed months before or of any benefit to the Rock Island estate therefrom. No hearings were conducted by any Congressional committee in connection with that portion of the Staggers Act dealing with the Rock Island.[22] Thus there is no basis whatsoever for the Government's assertion of a relationship between the March 4 agreement and the Staggers Act or any private benefit to the Rock Island estate.

Moreover, the program enacted by Congress did not even advance the public interest objectives of maintaining Midwest rail service expressly cited by Congress in the preamble to the Act. Former Rock Island employees who are employed by carriers acquiring parts of the Rock Island lines will not require, and cannot benefit from, the labor protection program prescribed in the Rock Island Act. The only employees to be "protected" by the Rock Island Act are those former employees whose services will not be required by acquiring carriers. To compel the estate to pay them

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[22] Moreover, when the portion of the Staggers Act which amended the original Rock Island Act was first introduced on the floor of the House of Representatives, shortly before the bill was passed, complaints were voiced that members had not even had time to read the "massive document" before it was to be considered by the House. 126 CONG. REC. H 8576 (daily ed. September 9, 1980) (remarks of Rep. Sebelius). The meager legislative history behind the passage of the Staggers Act amendments to the original Rock Island Act is thus sharply distinguishable from the Surface Mining Act, sustained in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, supra*, 101 S.Ct. at 2361 and n.19, which "became law only after 6 years of the most thorough legislative consideration."

would in no way, despite the Act's preamble, maintain the "uninterrupted continuation of service over Rock Island lines" or prevent the "cessation" of service over those lines. As Judge McGarr stated (J.A. 152a-153a):

> There is in . . .the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains . . . to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the other carriers and the Interstate Commerce Commission and the ongoing supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. . . . [T]hese are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in the face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

In short, where property is being sought to benefit only the public interest, the conclusion is inescapable that there has been a taking of private property for the public good for which adequate compensation is required.

III.

THE ROCK ISLAND ACT DEPRIVES THE ROCK ISLAND ESTATE OF DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT AND CONTRAVENES THE UNIFORMITY REQUIREMENT IN THE BANKRUPTCY CLAUSE.

The Rock Island Act is an extreme but fortunately rare example of legislative disregard for basic constitutional principles. It is constitutionally deficient in several respects.

A. The Legislative Direction As To How The Judiciary Should Decide This Particular Case Contravenes The Doctrine Of Separation Of Powers And The Due Process Clause.

By enacting the Rock Island Act, Congress improperly interjected itself into a single piece of litigation in an attempt to direct the outcome of that litigation. The Act was passed five years after the reorganization proceedings were initiated, four months after the reorganization court had determined that liquidation was in the best interests of the estate and was consistent with the public interest, and one week after the Commission expressed its agreement with that conclusion. Congress was aware, at the time of the passage of the Act, of the unbroken line of I.C.C. precedent that held that no labor protection should be imposed in system-wide abandonments. Moreover, Congress had been aware since April 14, 1980, that the district court intended to rule on abandonment and the related issue of labor protection on Monday, June 2, 1980. Despite all of this, on Friday, May 30, 1980, the Rock Island Act was enacted into law, ordering the estate to pay immediately up to $75 million to its former employees, to the detriment of the existing unsecured creditors and shareholders, and possibly the secured creditors as well. In October, 1980, Congress

re-enacted the same labor protection scheme after Judge McGarr had found it to be unconstitutional and after the matter had been submitted to this Court for review.

The Rock Island Act forbids the reorganization court to follow precedent or to give effect to the evidence before it that the imposition of labor protection is unfair, inappropriate and unconstitutional. The statute applies only to the action of the reorganization court in this particular case, and the Act requires that the reorganization court enforce whatever order the I.C.C. enters. *See* Sections 106(c), (e)(2) and 110(b).

Congress has the power to enact uniform bankruptcy laws and laws regulating commerce. It does not have the power to tell a particular court what orders to enter in a particular case. That is the exercise of judicial power, which the doctrine of separation of powers and the constitutional structure based upon that doctrine commits to the judiciary, not the legislature.

This Court has described "the doctrine of separation of powers" as "at the heart of our constitution", recognizing that the "practical statesmen" who met in Philadelphia "viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 119, 121 (1976). "This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." 424 U.S. at 123. *See also United States v. Nixon*, 418 U.S. 683, 703-04 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952).

It is true that "the separate powers were not intended to operate with absolute independence". *United States v. Nixon, supra*, 418 U.S. at 707. But,

> it is a breach of the National fundamental law if Congress . . . attempts to invest itself or its members with either executive power or judicial power.

Buckley v. Valeo, supra, 424 U.S. at 121-22, *quoting Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court invoked the principle that Congress cannot instruct a court how to decide a case or what weight to give to particular evidence. Seven years after authorizing the Court of Claims to return confiscated property to persons who had not supported the late rebellion, Congress in 1870 provided that the Court of Claims could only treat an accepted presidential pardon as conclusively establishing that the recipient had given aid and comfort to the rebellion. In invalidating the 1870 statute, the Court declared in *Klein:*

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?
>
> * * *
>
> But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.
>
> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> It is of vital importance that these powers be kept distinct.

80 U.S. (13 Wall.) at 146-47. Ninety years later, Mr. Justice Harlan's plurality opinion in *Glidden Co. v. Zdanok*, 370 U.S. 530, 568 and n.33 (1962), approved *Klein*, concluding that it is unconstitutional for the legislature "to invade the judicial province by prescribing a rule of decision in a pending case." *See Kilbourn v. Thompson*, 103 U.S. 168, 194 (1880). *See also* Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM.L.REV. 371, 383 (1976).

Separation of powers means that the judiciary, not the legislature, is to exercise judicial power. Though Congress may pass laws which prescribe rules to govern the public, it may not decide particular cases. Because Congress seldom endeavors to do so,

this Court rarely has had occasion in recent years to review "legislative justice". With respect to the occasional examples of legislative justice which continued into the early part of the last century, Roscoe Pound wrote in 1914,

> [L]egislative justice in its relatively short history in this country and in the relatively small number of cases in which it was exercised showed the influence of personal solicitation, lobbying and even corruption far beyond anything which even the most bitter opponent of our judicial system has charged against the courts in the course of a long history and after disposition of a huge volume of litigation.
>
> Legislative justice has always proved highly susceptible to the influence of passion and prejudice. . . .
>
> Closely related to the foregoing characteristic of legislative justice is . . . the preponderance of purely partisan or political motives as grounds of decision.
>
> * * *
>
> Hence from the Twelve Tables to modern constitutions men have agreed in prohibiting [legislative justice]. The provisions of modern constitutions in this respect represent more than the influence of eighteenth-century theory. They represent a universal experience of the ills involved in legislative justice.

Pound, *Justice According To Law: Legislative Justice,* 14 COLUM.L.REV. 1, 8-10, 12 (1914) (footnotes omitted). There can be no assurance that Congress was free from the types of pressure referred to by Dean Pound when, at the urging of the railway labor unions, 126 CONG. REC. H 8548-49 (daily ed. Sept. 9, 1980) (remarks of Rep. Staggers), it enacted the Rock Island legislation during an election year.

For a legislature to provide that a court in a pending suit must order a named party to pay other parties a large sum of money would deprive the named party of due process in the most basic, procedural sense of that term. Such legislative interference with

the judicial process would deprive the adversely affected party of his right to a decision by a tribunal that has given him a fair hearing, and would seriously disrupt the proper exercise of judicial power by the judiciary.

In *Hurtado v. California*, 110 U.S. 516, 535-36 (1884), this Court held that legislative transfers of one person's property to another violate due process. The Court stated:

> But it is not to be supposed that these legislative powers are absolute and despotic and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. *It must be not a special rule for a particular person or a particular case....* [It would exclude,] as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, *and acts directly transferring one man's estate to another*, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation.

(Emphasis supplied.) *Accord*, *Lovett v. United States*, 66 F.Supp. 142, 151-52 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946).

For Congress to direct the reorganization court to decide this case contrary to what the court had already determined was required by the Constitution is a flagrant departure from established constitutional principles and a transparent attempt to impose legislative justice. Whatever sympathy the condition of former railroad employees represented by strong unions can invoke, this cannot justify legislative intervention in a judicial proceeding in order to deprive the estate, its creditors and shareholders of their legal rights.

B. The Rock Island Act Violates Both The Uniformity Requirement Of The Bankruptcy Clause And The Equal Protection Component Of The Due Process Clause Of The Fifth Amendment Because It Applies Only To One Company.

The Rock Island Act, insofar as here relevant, applies only to the estate of the bankrupt Rock Island Railroad. This is evident

from its title and preamble. The Act violates both the uniformity requirement of the Bankruptcy Clause and the equal protection requirement of the Due Process Clause because it imposes a special costly obligation on that estate and no one else.

1. The Rock Island Act Contravenes the Uniformity Requirement in the Bankruptcy Clause.

The uniformity provision in the Bankruptcy Clause, art. I, § 8, cl. 4, provides that Congress shall have the power "to establish uniform laws on the subject of bankruptcies throughout the United States." This Court has said that "[t]he laws passed on the subject must, however, be uniform throughout the United States . . . [the] uniformity [required] is geographical. . . ." *Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902).

The Rock Island Act seeks to determine the rights of creditors and shareholders to a bankrupt's estate. It is, therefore, a law "on the subject of bankruptcies." *Wright v. Union Central Life Insurance Co.*, 304 U.S. 502, 513 (1938); *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific Railway*, 294 U.S. 648, 673 (1935). A law on bankruptcy "includes the power . . . to distribute [the insolvent debtors'] property." *Hanover National Bank v. Moyses, supra*, 186 U.S. at 188.[23]

[23]Even if this legislation were regarded as an exercise of Congressional power under both the Commerce Clause and the Bankruptcy Clause, it is settled that the broad commerce power is limited by a number of more specific constitutional provisions. The limitations in the First, Fourth, Fifth, Sixth, Seventh and Eighth Amendments, for example, apply to the enforcement of laws regulating interstate commerce. So do the provisions in art. 1, § 9, prohibiting bills of attainder and *ex post facto* laws, and laws imposing export duties or preferring the ports of one state over those of another. The qualification of a broad constitutional provision by a more specific one is analogous to the "basic principle of statutory construction that a specific statute controls over a general provision. . . ." *HCSC-Laundry v. United States*, 101 S.Ct. 836, 838-39 (1981); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961).

In the *3R Act Cases, supra*, 419 U.S. at 159, this Court recognized that distinctive treatment of railroad bankruptcies, which presented special problems of their own, was not "beyond the limit of congressional power", citing *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific Railroad*, 294 U.S. 648, 671-72 (1935). In the *3R Act Cases*, this Court permitted distinctive treatment of railroad bankruptcies in the Northeast region while preserving the uniformity requirement. The Court there was faced with legislation designed to remedy the emergency created when rail service throughout the Northeast was threatened with financial collapse. The Court upheld the legislation designed to resolve these "geographically isolated problems." *3R Act Cases, supra*, 419 U.S. at 159. The Act was found not to contravene the uniformity requirement, despite its limited territorial application, because "the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies." 419 U.S. at 161.

None of the circumstances that justified the holding in the *3R Act Cases* is present here. At the time the Rock Island Act was enacted, another railroad besides the Rock Island was in the process of liquidation under Section 77 of the Bankruptcy Act of 1898,[24] the New York, Susquehanna and Western Railroad.[25] The Rock Island Act, however, does not affect that bankrupt estate. Accordingly, the Act cannot even achieve the technical uniformity that was characteristic of the 3R Act.

Additionally, the Rock Island Act, unlike the 3R Act, does not purport to solve an emergency created by unique geographical problems. It deals solely with the financial situation of employees of a single carrier who are no longer needed in the rail industry.

[24]Section 77 has now been replaced by Sections 1161-74 of the Bankruptcy Code of 1978, 11 U.S.C. §§ 1161-74. Sections 1161-74 apply to all proceedings filed after September 30, 1979. One additional company performing rail service is liquidating under this new statute. *In Re Auto-Train Corp.*, 7 Bkrptcy. Ct. Dec. 906 (D.D.C. 1981).

[25]*In re New York, S. & W. R.R.*, No. B-76-182 (D.N.J.).

This situation, however, is not unique to the Midwest; it occurs whenever a railroad in any region of the country abandons its operations.

Finally, the Rock Island Act "is as far from being uniform as is possible" because it applies to only a single bankrupt. *In re Sink*, 27 F.2d 361 (W.D. Va. 1928), *appeal dismissed*, 30 F.2d 1019 (4th Cir. 1929). Although Congress under the Bankruptcy Clause can create classes of debtors, it cannot read the uniformity provision out of the Constitution. If there is to be uniform bankruptcy legislation, the legislation cannot be limited in application to a single bankrupt. Assuming for the sake of argument that railroads in liquidation constitute a rational classification, the Rock Island Act fails to achieve uniformity even as to this limited class. Only one of the two railroads which have been in liquidation in recent Section 77 proceedings, the New York, Susquehanna & Western Railroad[26] and the Rock Island, has been directed by Congress to make labor protection payments.[27]

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[26]In refusing to impose labor protective conditions on the Susquehanna, the reorganization court in that case observed that "[t]he facts of *Rock Island* are strikingly similar to the circumstances which obtain here." *In re New York, Susquehanna & Western R.R.*, 504 F.Supp. 851, 863 (D. N.J. 1980).

[27]The Milwaukee Railroad continues to pursue an income-based reorganization; it is not in liquidation. The labor protection program for displaced former employees of the Milwaukee Road contained in the Milwaukee Act was enacted by Congress upon the urging of the Milwaukee Road Trustee and the railroad unions. The Milwaukee Road, while abandoning all of its Western extension lines, continued in rail service operating a Midwest core. This large-scale abandonment was nevertheless only a partial abandonment and thus was subject to the condition that the employees displaced receive the form of labor protection traditionally imposed by the Commission in partial abandonment situations. See *supra* at 30. The total cost to the Milwaukee Road Trustee of that traditional form of labor protection was estimated to be somewhere between $300 million and $1.2 billion—with $350 million as the best estimate. *See In re Chicago, M., St.P. & P.R.R.*, Nos. 80-1347, 80-1348, 80-1545 and 80-1546, slip op. at 11 and n.7 (7th Cir. Aug. 17, 1981).

(Footnote continued on following page.)

From whatever perspective it is viewed, the Rock Island Act fails to achieve any semblance of uniformity. It does not apply to all railroad reorganization proceedings pending at the time of its passage. It does not apply to all members of the same class of bankrupts. It does not apply to all railroads in liquidation. It is "as far from being uniform as is possible." *In re Sink*, *supra*, 27 F.2d at 361. If the uniformity provision of the Bankruptcy Clause is to retain any meaning, this Court must find the Rock Island Act constitutionally defective because it represents an attempt by Congress to enact a special bankruptcy law for a single debtor.

2. The Rock Island Act Violates the Equal Protection Component of the Due Process Clause.

The equal protection component of the Due Process Clause is designed to insure that laws imposing burdens will apply equally to persons similarly situated, and will not apply only to particular persons selected by the legislature. A law which on its face regulates only a particular person is as at least suspect, as presumptively depriving that person of equal protection. The burden, however it be phrased, should be on the party attempting to justify the legislative selections.

Appellees recognize that in highly unusual circumstances there can be "a legitimate class of one". *Nixon v. Administrator of*

(Footnote continued from preceding page.)
Congress, by enacting the Milwaukee Act's labor protection program providing for an elective new labor protection program of up to $75 million, relieved the Milwaukee Road Trustee of the immense burden of the traditional labor protection conditions that would have been imposed in this partial abandonment situation. As a result, the Milwaukee Road Trustee advocated passage of the labor protection scheme of the Milwaukee Act. By contrast, the Rock Island Trustee, its creditors and shareholders opposed passage of the labor protection scheme of the Rock Island Act because the Rock Island was being totally abandoned and under settled Commission precedent and constitutional principles, see *supra* at 24-34, was not subject to any labor protection obligation.

General Services, 433 U.S. 425, 472 (1977). The Rock Island, however, was not in a unique situation. Other railroads have become bankrupt and cashless and then discontinued operations. The Susquehanna Railroad was in that condition at the time the Rock Island Act was passed, *In re New York, Susquehanna and Western Railroad, supra*, 504 F.Supp. 851. Yet Congress did not impose a heavy financial burden on the Susquehanna estate. Nor does it matter that the Susquehanna is smaller than the Rock Island. Bankrupt railroads, like any other category of bankrupts, are never identical in all respects. But that distinction does not justify special legislation applicable to a single company when the subject is one which can be dealt with by general legislation applicable to all railroads, all bankrupt railroads, or at least to a defined class. *3R Act Cases, supra*, 419 U.S. at 159-60.

This Court has upheld as not violative of the Equal Protection Clause statutes which contain exemptions from burdensome regulations for a named company or an identifiable small class of persons. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (grandfather clause exemption for two pushcart vendors), *overruling Morey v. Doud*, 354 U.S. 457 (1957) (invalidating exemption for American Express Company); *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933) (tax exemption for insolvent interurban railway); *Erb v. Morasch*, 177 U.S. 584 (1900) (speed of trains running through cities). But these exemptions were for the benefit of the exempted party and left standing general laws applicable to a class of persons. They differ, therefore, from laws imposing burdensome regulations only upon one company. *E.g., McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86-87 (1916) (adverse presumptions applicable only to a single company); *see Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 112, 114-15 (1901) (Harlan, J., concurring) (equal protection denied by stat-

ute which "applies only to Kansas City Stock Yards Company and not to other companies or corporations engaged in like business").

Because the Rock Island Act subjects only the Rock Island estate to the burden of supporting its former employees after the company had become entitled to cease operations and liquidate, it constitutes an unjustifiable classification in violation of equal protection and therefore of due process.

C. The Retroactive Imposition Of Additional Liability To Employees After The Rock Island Has Been Ordered To Liquidate Deprives The Rock Island Estate Of Due Process Of Law.

Assuming, *arguendo*, that Congress has the power to require prospectively that railroads must provide their former employees with labor protection even in the circumstance of liquidation and total abandonment, investors and sellers of supplies in that situation would know in advance that they were exposing themselves to the risk of losing their entire investments in order to subsidize unneeded railway laborers—and could protect themselves by refusing to advance credit. Perhaps Congress has not passed such a law for fear of this obvious result. *See Louisville Joint Stock Land Bank v. Radford, supra*, 295 U.S. at 595 n.27.

The question in this case is not whether such prospective legislation is constitutionally permitted, but whether Congress may impose a new liability retroactively—after the security holders and suppliers have advanced credit or the stockholders made their investments; after the railroad has been found not only to be bankrupt but also unable to reorganize as an operating carrier on an income-producing basis; and after it has been ordered to

liquidate and to abandon its lines.[28] The answer is that in the context of these proceedings this retroactive legislative action violates the due process rights of the estate and its creditors and shareholders to have the remaining assets of the estate distributed for their benefit in the prescribed order of priority.

The unfairness of imposing after-the-fact liability is recognized in law and in life. Rules are not to be changed after the beginning of the game. The principle that laws will be construed to apply prospectively, not "retroactively unless the legislature has plainly commanded that result", *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 368-69 (1980), *aff'g*, 592 F.2d 947 (7th Cir. 1979), *quoting Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 721-22 n.40 (1978), and the constitutional prohibition against *ex post facto* criminal laws are illustrative. The same principle is embodied, though more flexibly, in the Due Process Clause, because, in the absence of some special justification, the imposition of burdensome civil liability after the fact is also arbitrary and unreasonable.

[28]RLEA and the Government reiterate that Judge McGarr's June 2, 1980 order of abandonment was issued three days after the President signed the Rock Island Act. RLEA Br. 13, 41, Govt. Br. 35. They imply that because the Rock Island Act was signed into law before the formal abandonment order issued, the Act's obligations were not retroactively imposed on the Rock Island estate. Appellees do not believe that the merits of this case should turn on who won this "race to the courthouse".

In any event, Judge McGarr's order to liquidate the railroad was entered January 25, 1980. Judge McGarr's order of April 14, 1980, stated that he would rule on the petition for abandonment and the attendant labor protection issue on June 2, 1980. Thus, Congress was fully aware at the time it passed the Rock Island statute that the Rock Island was being liquidated. As Judge McGarr expressly stated, the June 2, 1980 order was merely a "technical recognition" of the Rock Island's already ripe constitutional right to withdraw from rail service. (J.A. 264a.)

Additionally, if the Staggers Act is necessary to cure deficiencies in the original Rock Island Act, as Congress seemed to suggest by the passage of the Staggers Act after the original Act was declared unconstitutional and was before this Court on review, then the effective law, *i.e.*, the original Act as amended by the Staggers Act, was not passed until long after the formal certificate of abandonment was issued.

For example, in *Usery v. Turner Elkhorn Mining Co., supra*, 428 U.S. at 16-17, the Court recognized that a retroactively imposed obligation is especially vulnerable:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Despite this vulnerability, the Court found that imposing liability on the coal operators who had profited at the expense of the health of their former employees was a rational means to allocate the horrendous medical costs incurred by those former employees who contracted black lung disease during their employment. 428 U.S. at 17-19. The coal operators had known for at least 20 years that black lung disease was proximately caused by work in coal mines. 428 U.S. at 17. Moreover, as going concerns, the coal operators had future income available to pay for the medical costs associated with the labor that had produced past profits. Thus, these costs for past disabilities could be spread beyond the coal operators to coal consumers as well. 428 U.S. at 18.

No comparable justifications support the imposition of labor costs upon the estate of the Rock Island. Unlike the coal operators in *Usery*, the Rock Island was not a going concern when the statute was passed, but was in the process of liquidation. It will not have future income available to pay for the newly-imposed labor protection, and it cannot adjust future rates to spread these new costs among consumers of rail services. Unlike the coal operators, neither the Rock Island nor its creditors have profited from the prior activities of the Rock Island's former employees in a way that bred debilitating consequences such as black lung disease. The labor protection payments required of the Rock Island are in no way attributable to its prior conduct. Indeed, the unproductive work rules and the strike of the former employees were at least partly responsible for the disastrous condition of the railroad, and

these former employees benefited by their employment for almost five years while the estate was in reorganization, to the substantial detriment of the estate. See *supra* at 6.

This case is like *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935), in which, as this Court noted in *Usery*, 428 U.S. at 19, Chief Justice Hughes and Justices Brandeis, Stone and Cardozo joined with the majority in invalidating a retroactive statutory provision requiring employer-financed pensions for persons who had been employed by the railroads during the year before the statute was enacted. 295 U.S. at 348-50. In *Usery*, this Court assumed that this portion of *Alton* retained its vitality but found *Alton* distinguishable on grounds which make *Alton* applicable here (428 U.S. at 19):

> The point of the black lung benefit provisions is not simply [as in *Alton*] to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business.

Here, in contrast, the only effect of paying additional sums to former Rock Island employees is to meet their generalized need for funds.

The weight of the *Alton* case is not impaired by *Nachman*, *supra*, 446 U.S. 359, decided by this Court in 1980. The *Nachman* case was concerned with the federal program to insure unfunded but vested pension benefits for employees where the employer had terminated the plan, pursuant to its terms, before the effective date of the federal statute, thereby limiting the employer's liability under the plan to the amount in the fund. The court of appeals upheld the validity of the statute on the basis of its analysis of the *Usery* case and this Court's subsequent decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). Although this Court limited its grant of certiorari in *Nachman* to the question of

statutory construction (446 U.S. at 368), it quoted with approval from the opinion below on the constitutional issue. 446 U.S. at 367-68 n.12, quoting from 592 F.2d 947, 962-63 (7th Cir. 1979).

In balancing the equities, the court of appeals in *Nachman, supra*, 592 F.2d at 962, noted:

> In [*Spannaus*], and *Alton Railroad* the Court emphasized that the employer was being forced to pay added compensation for fully compensated services. The employers received no benefit in the bargain. [The employers in *Alton Railroad*] had never agreed to pay any retirement benefits.

The same is true here. In *Nachman*, the court of appeals noted that the reliance interest of the employees in vested pension benefits "outweighed the employer's reliance on prior funding", that is, on the right to pay no more than the amount in the fund. 592 F.2d at 961-62. Moreover, unlike the situation in *Nachman*, 592 F.2d at 962 n.32, the Rock Island estate had vested rights which were being curtailed; its former employees had no vested rights.

Additionally, in sharp contrast to the Rock Island Act, in the statute under review in *Nachman*, "Congress provided net worth limitations on the amount of potential liability" in order to protect employers "on the verge of bankruptcy," and "devised other provisions to temper the burdens imposed." 592 F.2d at 963. In sum, the rational bases supporting the "not wholly prospective" *Nachman* statute do not support the wholly new after-the-fact liability imposed upon the Rock Island. Indeed, no rational basis exists for imposing new liability to former employees upon the creditors and shareholders of a bankrupt, non-operating and unreorganizable railroad.

The retroactive imposition of a $75 million labor protection claim would be particularly offensive to the rights of secured creditors. Congress cannot retroactively impair a secured creditor's right to obtain full satisfaction of the debts owed to it by a

bankrupt estate. *Louisville Joint Stock Land Bank v. Radford, supra,* 295 U.S. 555. In *Radford*, this Court held that an attempt by Congress to take from secured creditors without compensation "rights in specific property which are of substantial value" violates the Taking Clause. 295 U.S. at 601. The *Radford* principle requires that no labor protection costs can be imposed on the estate unless it is first determined that these retroactive costs will not impinge upon the secured creditors' right to obtain full satisfaction of their claims.

The Rock Island Act violates the Due Process Clause in the separate respects argued above. The cumulative effect of these various impingements even more clearly establishes that the Act violates the concept of fundamental fairness embodied in due process.

IV.

THE MERE POSSIBILITY OF A SUBSEQUENT TUCKER ACT REMEDY DOES NOT PRECLUDE THIS COURT FROM ENJOINING THE IMPLEMENTATION OF THE ROCK ISLAND ACT OR FROM DECIDING THE TAKING ISSUE NOW.

RLEA argues that the Rock Island estate must immediately make the labor protection payments required by the Rock Island Act but that this Court should defer a determination of whether the Act compels a taking for which compensation is required until a subsequent proceeding by the estate against the Government under the Tucker Act. The argument for deferral of the taking issue is based on the language of Section 124(c), which was added to the original Rock Island Act by the Staggers Act:

> Nothing in this Act . . . shall limit the right of any person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the "Tucker Act").

The Tucker Act, although it permits suit in the Court of Claims "upon any claim against the United States founded . . . upon the Constitution", 28 U.S.C. § 1491, does not provide the Government with blanket authority to violate constitutional rights simply because the injured party may have an action for damages under the Act. Moreover, even if it did, and the existence of a subsequent Tucker Act remedy were held to permit the labor protection program of the Act to be immediately implemented, this Court should still determine the taking issue now.

A. The Fact That A Subsequent Action For Damages Under The Tucker Act Is Not Precluded Does Not Bar This Court From Enjoining The Implementation Of An Unconstitutional Act.

The thrust of RLEA's Tucker Act argument is that no taking is unconstitutional so long as there remains the possibility of an action for damages under the Tucker Act. This argument focuses solely on the taking issue and ignores the other respects in which the Rock Island Act violates constitutional provisions which protect the Rock Island estate, its creditors and shareholders—*viz.*, the principle of separation of powers, the uniformity provision of the Bankruptcy Clause, and the Due Process Clause. The Rock Island Act is unconstitutional not only because it violates the due process rights of the creditors and shareholders of the Rock Island to withdraw their investments from the service of the public interest under *Brooks-Scanlon, supra,* but also because the Act singles out one bankrupt estate and legislatively dictates a decision in a pending judicial proceeding, displacing rights of both creditors and shareholders that had already vested under prior law when the Act was adopted. Thus, the possibility of a subsequent action for damages under the Tucker Act does not cure the constitutional defects that otherwise exist in the Rock Island Act wholly apart from the taking issue, nor does it bar an injunction against the implementation of the Act.

Even focusing solely on the taking issue, RLEA's view that the Tucker Act cures all evils is unduly simplistic:

> Even in a situation where there is no justification for the government's refusal to accept a complainant's assertion that the assailed action is a taking, such a haughty attitude on the government's part does not make the assailed taking unconstitutional because the provision for compensation in the Tucker Act satisfies the guarantees of the Taking Clause.

RLEA Br. 34. The primary difficulty with this argument is that it has no limits: it would allow the Government to blatantly violate constitutional rights so long as it does not immunize itself from a later suit for damages. Under this view, no taking could ever be enjoined because a Tucker Act damage remedy would always be available.

The argument is refuted by *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 584-85, in which this Court held unconstitutional, as violative of the separation of powers doctrine, President Truman's executive order seizing vital steel mills that had been shut down by a labor dispute during time of war. In that case, it was argued that a preliminary injunction should have been denied because the companies could recover full compensation for the taking in the Court of Claims under the Tucker Act. The Court rejected that argument. Despite the compelling needs of the nation in time of war, the Presidential taking involved in *Youngstown* was enjoined. Here, seizure of the Rock Island's money is sought in much less compelling circumstances—where the causal relation between the taking and the advancement of national transportation policy is attenuated at best. The *Youngstown* decision establishes that the existence of a Tucker Act remedy does not preclude enjoining a taking, especially when the taking violates the Constitution wholly apart from the question of whether just compensation will be provided.

The *Youngstown* decision provides the appropriate limitation upon the Government's right to rely on the availability of a

Tucker Act damage remedy to excuse unconstitutional conduct: when the Tucker Act remedy would as a practical matter not provide adequate relief, an injunction may appropriately be granted. The Court in *Youngstown* found "no reason for delaying decision of the constitutional validity of the [seizure] orders", in light of the fact that

> seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement.

343 U.S. at 585.

In this case, forcing the already bankrupt and defunct Rock Island to make what is tantamount to a $75 million loan to the Government would result in irreparable injury to the estate through the material disruption of the ongoing liquidation. The reorganization court found that the payment of $75 million would represent "a significant percentage of the [estate's] total assets" (J.A. 207a) and would disrupt the process of liquidation. As the court recognized, no plan of reorganization providing for distribution can be meaningfully formulated or carried out when up to $75 million of the estate's assets have been replaced by an uncertain claim, which is dependent on the outcome of litigation in the Court of Claims and Congress' later appropriation of funds.[29]

This disruption and delay of the liquidation would have a significant impact on the creditors of the estate, including both large

[29]Indeed, Judge McGarr recently explained to a representative of a state which was complaining that there was no formal plan of liquidation:

> "I have deferred the filing of a formal plan from time to time for a lot of reasons. The principal one lately being an Act of Congress which I have held unconstitutional would raid the Rock Island Trustee's treasury to the extent of seventy-five or more millions of dollars, and if that is constitutional we have a far different asset picture than otherwise."

Transcript of Proceedings, August 25, 1981, at 15.

and small investors and suppliers, who have been awaiting payment from the railroad for years. They, and persons to whom they owe money, may themselves be in difficult financial straits because of the failure of the Rock Island to pay its debts. The delay in liquidating the estate will cause injury to a great many creditors and investors for many more years. As Judge McGarr stated at the hearing on June 20, 1980 (J.A. 179a):

> We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small [taxing] authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

RLEA does not address the reorganization court's finding of irreparable injury. It argues instead that the estate may be compelled to turn over its money, without regard to whether the estate is obligated to pay that money, because the Rock Island may eventually be able to sue the Government for damages. No case has ever held that the Government can compel a person to turn over his money, either to the Government itself or to a beneficiary specified by the Government, without regard to whether the person is obligated to pay that money, merely because he can eventually sue the Government for damages in an effort to get it back. If such forced loans were constitutionally permissible, Congress could order citizens with available funds to pay any public expense, as long as they could then sue under the Tucker Act to seek reimbursement. Often Congress is unwilling to face up to the need for spending money as rapidly as the public interest requires. Or it may be pressed to provide money to politically desirable